No. 96-1184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
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CLERK

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF NEW HAMPSHIRE, VERMONT, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, MAINE, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. Does the *Rooker-Feldman* Doctrine Bar Federal Courts from Hearing Claims by Class Members Against Class Counsel and Others Arising From a State Court Class Action Settlement Where the State Court Lacked Personal Jurisdiction Over Absent Class Members?

II. Does the *Rooker-Feldman* Doctrine Bar Federal Courts from Hearing the Claims of State Court Class Action Members that their Former Class Counsel and Others Committed Fraud, Malpractice and Breach of Fiduciary Duties Against Them, Where Those Claims do not Collaterally Challenge the Validity of any Prior State Court Judgment?

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INTEREST OF THE AMICI CURIAE

The States of New Hampshire, Vermont, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania and Wyoming ("the States" or "the amici States"), acting through their Attorneys General and pursuant to Supreme Court Rule 37, submit this brief in support of the Petitioners.[1]

The States seek to protect important due process rights of their citizens to obtain redress for injuries from class counsel and others for negotiating and obtaining approval of a foreign state court of a settlement alleged to have deprived class members of property without jurisdictional basis or the minimum due process protections established by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Class actions are peculiarly vulnerable to abuse through devices which subordinate the interests of absent class members to the interests of others, including class counsel.[2] The amici States are acutely concerned over what

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[1] Of the participating States, all except Hawaii are represented by their Attorneys General. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state.

[2] The potential for abuses in class action litigation has been well documented in both the case law and the literature. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 787 (3d Cir. 1995), *cert. denied sub nom. General Motors Corp. v. French*, 116 S.Ct. 88 (1995) (vacating district court's orders certifying settlement class and approving settlement; "[W]ith less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the

expense of absentees), and other abuses"); *id.* at 803 (expressing concern that "counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources"); *In re Asbestos Litigation,* 90 F.3d 963, 993-1026 (5th Cir. 1996) (Smith, J., dissenting) *petition for cert. filed* (Mar. 3, 1997) (No. 96-1394); *In re Ford Motor Co. Bronco II Prods Liab. Litigation,* 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion,* 80 CORNELL L. REV. 851, 851 (1995) ("[I]t is increasingly the corporate defendant that wishes to be sued in a class action and--with the help of a friendly plaintiffs' attorney--that often actively arranges for such a suit to be brought by a nominal plaintiff."); John C. Coffee, Jr., *Rethinking the Class Action,* 62 IND. L.J. 625, 628-29 (1987) (describing potential for conflicts of interest in class action litigation in terms of "agency costs"); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction,* 80 CORNELL L. REV. 811, 813 (1995); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. LEGAL STUD. 47, 61 (1975) (coining phrase "lawyer-entrepreneur" to describe class counsel); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.,* 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There,* 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Jonathan R. Macy & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation,* 58 U. CHI. L. REV. 1, 7-8 (1991) (class counsel not subject to monitoring by class, operating "largely according to their own self-interest"); John Leubsdorf, *Co-opting the Class Action,* 80 CORNELL L. REV. 1222, 1225 (1995) (describing "third stage of concern" about class actions as "mov[ing] beyond a focus on the temptations of class counsel to an analysis of how those opposing the class--that is, defendants and their lawyers--can

is widely perceived as an escalating pattern of problematic class action settlements with potentially prejudicial effects on our citizens.[3] This case involves a particularly egregious situation in which Petitioners -- absent members affected by an allegedly abusive class action settlement -- have been deprived by the decision below of adequate recourse to assert their claim that they have been deprived of property without due process of law or have been the victims of fraud or

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manipulate those temptations for their own benefit"); Kurt Eichenwald, *Class-Action Suit Deadline Expired, Prudential Argues,* N.Y. TIMES, Dec. 11, 1995, at D2; Kurt Eichenwald, *Lawyers Receiving $22.6 Million of Prudential Settlement,* N.Y. TIMES, May 20, 1994, at D2; Kurt Eichenwald, *Millions for Us. Pennies for You,* N.Y. TIMES, DEC. 19, 1993, at § 3, 1; Diana B. Henriques, *High Court Hands Corporations Victory on Class-Action Suits,* N.Y. TIMES, Feb. 28, 1996, at D1; Brenda N. Leer, *Thanks to Lawyers, I'm 93 Cents Richer,* SAN DIEGO UNION-TRIBUNE, July 14, 1996, at G3; Barry Meier, *Fistfuls of Coupons,* N.Y. TIMES, May 26, 1995, at D1; Scot J. Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive,* L.A. TIMES, May 20, 1994, at D1; David Phelps, *Attorneys Who Get Paid in Cash Irk Clients Who Get Paid in Scrip,* STAR TRIBUNE, April 17, 1994, at 4D; Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit,* WALL ST. J., July 18, 1996, at A1; Lawrence W. Schonbrun, *How Public Can Stop Class-Action Racket,* S.F. CHRON., Oct. 18, 1993, at B3; Kathy Walt, *Truck Lawsuit Shifts into Reverse; Attorney Fees Issues Cited in Ruling,* THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Vaughn R. Walker, *Class-Action Suits Overdue for Fee Reform,* SACRAMENTO BEE, June 6, 1993, at B7; Bernard Weinstein, *Class Action Filings; Often Are Lawsuit Abuse,* DALLAS MORNING NEWS, July 28, 1996, at 6J.

[3] Certain of the amici and other States have already filed briefs with the Court this term calling into question two other class settlements where notice to the class and representation of the class were alleged to have been constitutionally inadequate. *See* Brief for the States of New York, Vermont, etc., in *Adams v. Robertson*, No. 95-1873; and Brief for the States of New York, California, etc., in *Amchem Products, Inc. v. Windsor*, No. 96-270.

malpractice by persons who stood in a fiduciary or other special relationship to them.

Accordingly, the amici States, as parens patriae, appear as advocates for the availability of an effective, but nonduplicative vehicle for enforcing the procedural rights of absent class members articulated in *Phillips Petroleum Co. v. Shutts*, and for the availability of an effective local forum in which absent class members might raise separate and *bona fide* claims of fraud or malpractice against the class' legal counsel or others.

STATEMENT OF THE CASE

This case arises in the wake of *Hoffman v. BancBoston Mortgage Corp.*,[4] No. CV-91-1880 (Mobile Cty., Ala. 1993), a nationwide class action which has been widely criticized as a grotesque abuse of the class action process.[5] The *Hoffman* action was filed against Bank of Boston Corporation and BancBoston Mortgage Corporation (hereinafter collectively "the Bank") for holding excess mortgage escrow amounts in the accounts of over 700,000 mortgagors. Following the granting of partial summary judgment in the plaintiff class' favor, a settlement was proposed to and approved by the Alabama court in January 1993. The settlement provided for a 19% reduction in the

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[4] In all references to *Hoffman v. BancBoston Mortgage Corp.*, the States accept as true the well-pled allegations contained in Petitioners' initial Complaint in the district court, which is contained in the Appendix to the Petition for Writ of Certiorari (hereinafter "A") at 49-105.

[5] *See, e.g.*, Barry Meier, *Math of a Class Action: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; John C. Coffee, Jr., & Susan P. Koniak, *The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at A-11; Jane Bryant Quinn, *Fighting the System, Everywhere*, NEWSWEEK, Oct. 2, 1995, at 71; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996).

amount of escrow funds that could be held; a one-time interest payment to each class member of between $0 and $8.76; and a refund of the excess escrow funds in each account prior to the termination of the mortgage, from which attorney's fees would be deducted. A-77. Rather than basing the amount of attorney's fees on the actual economic benefit to the class members (that is, on the value of having earlier access to any excess escrow funds), the settlement provided for fees calculated as a percentage of *the total of excess escrow funds themselves*--money which had always belonged to the class. *See* A-79. These fees amounted to at least $8.5 million of the account-holders' own money. *See* A-4.

As class members in *Hoffman*, Petitioners received a Notice of Settlement, approved by the Alabama court, which stated that the settlement was "fair," that the attorney's fees were "reasonable," and would not exceed one-third of the "economic benefit" to the class. In fact, Petitioners allege, the notice was deceptive in that class counsel and the Bank knew that most, if not all, class members would suffer a *net out-of-pocket loss* as a result of the settlement. A-70-73. Petitioners further allege that this settlement was agreed upon in negotiations between class counsel and the Bank, and that its terms permitted class counsel to obtain from the escrow accounts of Petitioners and other class members millions of dollars in attorney's fees. In support of this allegation, Petitioners claim that class counsel rejected a prior settlement offer by the Bank under which the class would have received the same relief as it did under the settlement as ultimately agreed upon, but the Bank (not the class members) would have paid a lesser amount in attorney's fees. A-74-76. Petitioners also allege that the Bank subsequently attempted to disguise the true nature of the attorney's fee deduction in 1994 Annual Tax and Interest Statements to its mortgagees by deceptively labeling the deduction as a "miscellaneous disbursement." A-88-89.

Petitioners filed suit in the United States District Court for the Northern District of Illinois, asserting claims under RICO, 42 U.S.C. §1983 and various common law theories, including fraud, fraudulent concealment, negligent misrepresentation, and conversion; attorney malpractice against class counsel; and breach of fiduciary duty against class counsel and the Bank. The district court, reasoning that the Petitioners' claims constituted a collateral attack on a settled state court judgment, dismissed all counts under the *Rooker-Feldman* doctrine. A-17-34. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).[6] According to the district court, Petitioners' sole avenue for redress of any alleged wrong arising out of *Hoffman* was to file an action in the Alabama court which originally approved that settlement, seeking to have the judgment set aside as fraudulently obtained.

A three-judge panel of the Court of Appeals for the Seventh Circuit acknowledged the "superficially egregious" facts of the case, but affirmed the district court's decision. 92 F.3d 506, 512 (7th Cir. 1996)[7] Rehearing en banc was denied. However, five judges of the Seventh Circuit panel

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[6] The *Rooker-Feldman* doctrine derives from 28 U.S.C. § 1257, which vests this Court with exclusive federal jurisdiction to review final judgments of state courts and bars "direct review in the lower federal courts of a decision reached by the highest state court..." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994) (*Rooker-Feldman* bars "party losing in state court ... from seeking what in substance would be appellate review of the state court judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.")

[7] The Court of Appeals commented, "We won't deny that the Alabama judgment seems questionable on the surface. How can it be right that a plaintiff should recover less than $10 and have to pay nearly $100 in fees?" 92 F.3d at 511.

dissented from the denial and, in an opinion authored by Judge Easterbrook, reasoned that *Rooker-Feldman* should not be applied to bar Petitioners from proceeding with their claims in federal court. 100 F.3d 1348, 1351-52 (7th Cir. 1996).

SUMMARY OF ARGUMENT

The lower courts' refusal to consider Petitioners' jurisdictional and due process arguments before dismissing their action on *Rooker-Feldman* grounds directly conflicts with this Court's constitutional jurisprudence and with decisions of other Circuits, and has resulted in such a departure from the accepted course of judicial proceedings as to warrant the exercise of this Court's power of supervision. *See* Supreme Court Rule 10.1(a) (c).

The *Rooker-Feldman* doctrine properly bars collateral challenge in federal court to valid state court judgments. It does not apply to the claims presented by Petitioners for two reasons. First, Petitioners challenge the very jurisdiction of the Alabama state court whose judgment in *Hoffman* cast them in the role of defendants and deprived them of property without complying with the minimum contacts standard for due process established by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and on the grounds that their class action notice and representation were inadequate to confer jurisdiction under *Phillips Petroleum Co. v. Shutts*. Whenever such fundamental due process claims are raised, they must be heard, and jurisdiction found in the state court, before the *Rooker-Feldman* bar can be considered.

Second, Petitioners' claims against the Bank and former class counsel are essentially for breach of fiduciary duty and malpractice, which are independent of and do not require relitigation of any issue concluded in *Hoffman*.

Recent decisions of the Ninth and Eleventh Circuits and precedent from the Third Circuit all support the ability of parties like Petitioners to prosecute such independent claims against class counsel, notwithstanding *Rooker-Feldman*. The Seventh Circuit, embracing the reasoning of earlier decisions by the Fifth and Sixth Circuits, has exacerbated a conflict among the circuits. The Court should grant the requested writ of certiorari to settle a circuit conflict and to establish that *Rooker-Feldman* should not be extended to bar actions to enforce the independent rights of class members to insist on fair and adequate representation by their counsel. *See* Supreme Court Rule 10.1(a)

ARGUMENT

I. THE *ROOKER-FELDMAN* DOCTRINE SHOULD NOT APPLY TO CLAIMS BY CLASS MEMBERS ARISING FROM A STATE COURT CLASS ACTION SETTLEMENT WHERE THE STATE COURT LACKED PERSONAL JURISDICTION OVER ABSENT CLASS MEMBERS.

A. The Decision Below Cannot Be Reconciled With the Long-standing "Minimum Contacts" Rule Established by *International Shoe Co. v. Washington.*

The courts below invoked *Rooker-Feldman* to dismiss Petitioners' action based on the premise that the *Hoffman* class members were functionally made defendants with respect to the attorney's fee award in that action, and that the judgment of the Alabama state court "against them" was valid. 92 F.3d at 511-12. But *Rooker* itself was a case in which this Court recognized that "indubitably there was full jurisdiction in the state courts." *See Rooker,* 263 U.S. at 416.

As the facts of this case demonstrate, *Rooker-Feldman* simply cannot not apply where the state court judgment is void for lack of personal jurisdiction. Moreover, the consequences of extending *Rooker-Feldman* to bar *bona-fide* jurisdictional challenges to state court class action judgments should outweigh any concerns of comity or judicial economy from allowing such cases to be heard in federal forums.

It is a fundamental principle of American jurisprudence that no court may impose duties or obligations on persons over whom it has no basis for personal jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Judgments rendered without personal jurisdiction are not entitled to full faith and credit under the United States Constitution and cannot be enforced against the person or property of an absent party without due process of law. *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). This principle should not materially differ in cases where the judgment is applied to a class action plaintiff who has been treated as a defendant by the trial court.

The seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) holds that the due process clause absolutely forbids states from entering binding judgments against persons with whom the states have no contacts, ties or relations. 326 U.S. at 319. States may only force out-of-state defendants to defend themselves in, and bind them to a judgment of, a state court if the defendants possess minimum contacts with the state such that it is "reasonable and just, according to our traditional conception of fair play and substantial justice," for the state to exercise personal jurisdiction. 326 U.S. at 320.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1965) emphasizes the continuing vitality of *International Shoe* in the context of class actions. While holding that as long as certain procedural safeguards are satisfied, states could

exercise jurisdiction even over the claims of absent plaintiffs who lack minimum contacts with the forum, 472 U.S. at 806-14, the Court observed that this holding did not necessarily govern non-typical class actions where, as here, absent class members might be subjected to burdens ordinarily imposed on defendants. 472 U.S. at 810 n.2 and 811 n.3.[8]

The basis for this exception is clear from the factual circumstances to which this Court limited its holding in *Shutts*. According to *Shutts*, personal jurisdiction could be exercised over the claims of absent plaintiff class members because the judgment, even if adverse, would not "typically bind an absent plaintiff for any damages," 472 U.S. at 810, or force absent class members "to comply with some other form of remedy imposed by the court," including "liability for court costs and attorney's fees." 472 U.S. at 808. Moreover, absent class members typically do not need to hire counsel, are not subject to counterclaims or cross-claims or liability for fees and costs, and are not subject to coercive or punitive remedies. 472 U.S. at 810 & n.2.

The Alabama judgment at issue in this case is precisely the non-typical class action judgment excepted by *Shutts*. The *Hoffman* class members were effectively forced to respond in damages and to comply with the remedy imposed by the court, by having exorbitant attorney's fees deducted from their own escrow funds, thereby destroying any putative benefit arising from the judgment. Unlike the truly plaintiff class in *Shutts*, where absent class members could be properly bound to the relief granted by the forum court, the *Hoffman* class was transposed by the confiscatory settlement negotiated by the parties into a defendant class in

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[8] The Court also stated that its discussion of personal jurisdiction did not, "of course, . . . address class actions where the jurisdiction is asserted against a defendant class." 472 U.S. at 811 n.3.

all but name, whose property was taken without due process of law.

As a result, *International Shoe* applies to the case at bar and, on the facts as pled, most absent class members had no meaningful contacts with the State of Alabama before the *Hoffman* court entered its judgment. Indeed, the only common tie of the class members to the forum state was that they all had mortgage accounts with a company which itself had few meaningful ties to Alabama beyond having issued at least one mortgage to an Alabama citizen. Thus, the Alabama court had no right to impose "liability" on them. The judgment was a nullity, and this action cannot be considered an attempt to "appeal" that judgment, which might invoke the *Rooker-Feldman* doctrine.[9]

Significantly, the Seventh Circuit never undertook any considered analysis of this jurisdictional deficiency. The court's only response to the claimed lack of jurisdiction of the Alabama court was that "[e]ven if we were to accept the argument [that issues of personal jurisdiction must be addressed], it does not change the fact that lower federal courts cannot review decisions of the state court." 92 F.3d at 512.

This abdication of responsibility for meaningfully inquiring into the claimed jurisdictional defects in *Hoffman* improperly denied Petitioners access to the federal courts.

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[9] The need for state court jurisdiction to trigger the application of *Rooker-Feldman* is no different from the need for initial state jurisdiction before one state court will give full faith and credit to the decision of another state court. *See, e.g., Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assn.*, 455 U.S. 691, 704 (1982); *Nevada v. Hall*, 440 U.S. 410, 421 (1979), *rehearing denied*, 441 U.S. 917 (1979); *Heiser v. Woodruff*, 327 U.S. 726, 736 (1946), *rehearing denied*, 328 U.S. 879 (1946); and *Matter of Brady, Texas, Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991), *cert. denied sub nom. Sanders v. City of Brady, Texas*, 502 U.S. 1013 (1991).

The Seventh Circuit's expansive interpretation of *Rooker-Feldman* requires citizens to pursue direct appeals of adverse judgments entered by state courts having no plausible claim of jurisdiction and limits their recourse to the federal courts to the possibility that this Court might grant certiorari review of the original judgment. Our legal system traditionally permits citizens to ignore invalid judgments or to assert lack of jurisdiction in an appropriate forum if someone seeks to enforce that invalid judgment. Similarly, Petitioners should not be barred by a jurisdictionally invalid judgment from asserting claims against class counsel and the Bank. *Rooker-Feldman* should not be expanded to eliminate such appropriate means of asserting valuable due process rights.[10]

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[10] The erroneous nature of the decision below would be apparent had the *Hoffman* court required Petitioners to pay their own attorneys from funds held by Petitioners themselves. Any attempt by class counsel to enforce that judgment in the courts of Petitioners' home states could be contested on the grounds that the Alabama court had no jurisdiction over Petitioners. *See Hansberry v. Lee*, 311 U.S. at 40-41 (1940). Were it not for the fact that the *Hoffman* bank defendants had possession of the absent plaintiffs' monies and therefore were able to deduct those funds from Petitioners' escrow accounts without first seeking permission from a court of competent jurisdiction, Petitioners could have resisted any attempt to enforce the Alabama judgment in their own state courts or in any other court. Petitioners would also have been free to assert the fraud alleged in their complaint. That fortuity cannot, consistent with the United States Constitution, be used to undermine Petitioners' due process rights.

B. The Court Below Ignored Petitioners' Claim That the Class Notice and Representation in *Hoffman* Were Constitutionally Inadequate to Confer Jurisdiction Over Them.

A state court may exercise personal jurisdiction over a non-resident class member only if the class member is provided with (1) notice which is "the best practicable" and "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"; (2) "an opportunity to remove [themselves] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"; and (3) "an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts,* 472 U.S. at 812.

A notice that fundamentally misstates plaintiffs' rights and burdens is not constitutionally sufficient to support the exercise of jurisdiction over out-of-state class members. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957-58 (Tex. 1996), *aff'd.* 916 S.W.2d 949 (1996) (class action settlement properly set aside because class members did not receive adequate notice of projected amount of attorney's fees and expenses); *see also Ford Bronco Litig.,* 1995 U.S. Dist. LEXIS 3507 at *31 (class denied adequate information on attorney's fees).

Adequate notice is also a precondition to a second aspect of due process that inheres in class actions primarily involving money judgments: the right to opt out of the class. *Shutts,* 472 U.S. at 811. Without clear and accurate information on the impact of the litigation, class members cannot make an informed decision as to whether to opt out or otherwise object. *Cf. Haring v. Prosise,* 462 U.S. 306, 313 (1983) (state court judgment will not collaterally estop

subsequent federal court action where party against whom earlier decision is asserted did not have full and fair opportunity to litigate claim or issue decided by first court).

Nor may courts constitutionally exercise jurisdiction over absent class members unless the named plaintiff "at all times adequately represents the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry v. Lee*, 311 U.S. at 42-43); *Martin v. Wilks*, 490 U.S 755, 762 n.2 (1989) (recognizing exception to general rule that non-parties are not bound by court judgment when, in certain limited circumstances, non-party "has his interests adequately represented by someone with the same interests who is a party.") The Court recently reaffirmed this requirement in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761, 1766 (1996); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring) (stressing "centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement.")[11]

This requirement of adequate representation extends to class counsel as well as to the named class representatives. *See GM Pick-up Litig.*, 55 F.3d at 801; *VMS Limited Partnership Securities Litig.*, 1994 U.S. Dist. LEXIS 90 at *6-*8 (N.D. Ill. 1994); *Lewis v. Philip Morris, Inc.*, 419 F. Supp. 345, 352 (E.D. Va. 1976).

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[11] *Accord Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973) (class action judgment limiting retroactive relief to named plaintiff held not to bind other class members where named plaintiff did not appeal judgment on behalf of class; due process requirement of adequate representation cited as exception to general rule that class action judgment binds absent class members). According to the *Gonzales* court, "the primary criterion for determining whether the class representative has adequately represented the class for purposes of res judicata is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." 474 F.2d at 74.

Petitioners allege that the notice sent to the class affirmatively misrepresented the impact the settlement would have on class members. A-82-85. While the notice stated that attorney's fees would not exceed one-third of the "economic benefit" conferred on the class, that term was not defined and was actually applied in a manner which caused many class members to lose more than they gained.[12] Notice which is affirmatively misleading in some material respect is not adequate.

In addition, Petitioners challenge the adequacy of the class representation in *Hoffman*, alleging that class counsel, through malfeasance, conflict of interest and collusion with the defendants, utterly failed to represent their interests in the prior litigation, and actually worked to their own clients' detriment. In particular, the allegations of collusion between class counsel and the Bank in connection with the *Hoffman* settlement raise legitimate questions of fact regarding the adequacy of class counsel's representation of the class and the consequent binding effect of that settlement on absent class members which may properly be raised in a forum other than the original situs of the class action. *See In re Real Estate Antitrust Litigation*, 869 F.2d 760, 769 (3d Cir. 1989), *cert. denied sub nom. Chicago Title Insurance Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral

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[12] Although the Alabama court approved the notice, it was not asked to decide, nor did it consider, whether the notice contained a false statement of material fact, because defendants controlled the information brought before the court. These are the same circumstances which greatly concerned the Court of Appeals for the Third Circuit in *G.M. Pickup Litig.*, 55 F.3d at 787-88, where a settlement class created especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members because they were not adequately informed about the substance of the action.

attacks have been considered to be a necessary part of the class action rule.")

The Seventh Circuit's expansion of *Rooker-Feldman* denies a federal forum to citizens caught in deceptively abusive class actions originating in a state courts with no colorable claim of jurisdiction over them. Such a result is irreconcilable with the basic premise of *Shutts*.[13] Indeed, it is to preserve the integrity of the class action remedy that state court class action judgments -- particularly those that arise from settlement -- must remain vulnerable to collateral attack if they fail to satisfy the constitutional requirements of adequate notice and representation. *See Matsushita,* 116 S. Ct. at 888 (Ginsburg, J., concurring) ("[a] court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.")[14]

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[13] The Seventh Circuit's view that Petitioners must bring their claim before the Alabama state court is also misplaced, not only because the Alabama court arguably never had and could not exercise jurisdiction over them, but also because plaintiffs are entitled to seek redress in the forum of their choice. *See Firstsouth, F.A. v. LaSalle National Bank*, 1991 U.S. Dist. LEXIS 13139 (N.D. Ill. 1991); *Borock v. Shidler Group*, 1990 U.S. Dist. LEXIS 14619 (N.D. Ill. 1990). *But see Deboer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied* 116 S.Ct. 1544 (1996) (objector's submission to class action court's jurisdiction vitiates any due process challenge under *Shutts*).

[14] *See also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982) ("A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.")

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS BY ESTABLISHING THAT *ROOKER-FELDMAN* DOES NOT BAR FEDERAL COURTS FROM HEARING INDEPENDENT FRAUD AND MALPRACTICE CLAIMS OF STATE COURT CLASS ACTION MEMBERS.

Even assuming that the Alabama court had personal jurisdiction over plaintiffs in *Hoffman*, Petitioners' action against their former counsel and the Bank was improperly dismissed under *Rooker-Feldman* because those claims - sounding essentially in fraud and malpractice - are factually independent of the *Hoffman* judgment. They do not require relitigation or reopening of any issue resolved in that case. This distinction (and its implication for future litigation) was clearly recognized by the dissenting judges below:

> If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving settlement and awarding attorneys' fees, then the law of preclusion (res judicata) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case. Yet no one thinks that. *A malpractice suit is an independent action.*

A-48 (emphasis added).[15]

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[15] The reasoning of the dissenting judges is consistent with a prior decision of the Seventh Circuit, which recognized that *Rooker-Feldman* does not deprive a federal court of jurisdiction over a claim that alleges impropriety in the procurement of a prior state court decision. *Nesses v. Shepard,* 68 F.3d 1003, 1004 (7th Cir. 1995). *See also Derrickson v. City of Danville, Ill.,* 845 F.2d 715, 723 (7th Cir. 1988) (allowing state criminal prosecution of city commissioners for conflict of interest in manner of negotiating consent decree settling voting rights case in federal court, and distinguishing same from challenge to terms of

Both the Ninth and Eleventh Circuits have recently applied this rationale to permit class members to bring actions for attorney malpractice against their class counsel for alleged malfeasance in connection with a duly approved class action settlement. *Durkin v. Shea & Gould*, 92 F.3d 1510, 1513 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3611 (Feb. 24, 1997) (No. 96-1364) (quoting district court's ruling that "prior adjudication of a settlement's adequacy does not collaterally estop a legal malpractice claim challenging the conduct of a party's attorney during the prior action"); *Bennett v. Gen-Probe, Inc.*, 87 F.3d 1317 (Table), No. 95-55306, 1996 U.S. App. LEXIS 16541 at *3-4 (9th Cir. June 14, 1996), *cert. denied*, 117 S.Ct. 943 (1997). *See also Diaz v. Sheppard*, 85 F.3d 1502, 1506 n.2 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3468 (U.S. Dec. 20, 1996) (No. 96-1004). Precedent from the Third Circuit also supports this view. *See Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985).

On the other hand, two Circuits have held to the contrary. *See Adams Extract Co. v. Pleasure Hours, Inc. (In Re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981).

The reasoning of the Third, Ninth and Eleventh Circuits and of the dissenting judges below should control this Court's resolution of the conflict among the circuits for two reasons. As Judge Easterbrook noted, the Seventh Circuit's holding that a malpractice claim against class counsel is barred by *Rooker-Feldman* necessarily translates

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decree itself); *In re VMS Securities Litigation*, 156 F.R.D. 635, 639-40 (N.D. Ill. 1994) (court-approved class action settlement did not preclude subsequent state court action against defendant securities firm for fraudulently causing class members to fail to opt out of original class).

into a bar against any malpractice action arising from that action. 100 F.3d at 1352-53. Clearly, a malpractice claim arising out of an ordinary judgment is not barred by any preclusive effect of the judgment. *See* 100 F.3d at 1353. Yet the Seventh Circuit would grant the Alabama court's fairness hearing precisely that preclusive effect in the context of a class action settlement. In effect, the Seventh Circuit has barred Petitioners from asserting independent claims against their lawyers and the Bank based on the preclusive effect of a judgment by a court which arguably had no jurisdiction over them in the first place. Such a result is both absurd and unfair and compounds the injustice which Petitioners attribute to the *Hoffman* judgment.

Second, the position of the Third, Ninth and Eleventh Circuits is appropriately responsive to the growing concern over abuse of the class action process by attorneys and others. *See supra* at n. 2. While class actions are useful vehicles for the resolution of issues affecting large numbers of injured parties, persons negotiating class action settlements must remain accountable to class members. The ruling below insulates class counsel from any scrutiny beyond that accorded in a Rule 23 fairness hearing. That result improperly denies absent class members the right to seek redress against counsel or others for incompetence, abuse, or collusive settlement practices notwithstanding the resolution of any underlying action. *See* 100 F.3d at 1351. *See also Durkin v. Shea & Gould*, 92 F.3d at 1518 (quoting *Ruffalo v. Patterson*, 234 Cal. App. 3d 341, 343, 285 Cal. Rptr. 647, 648 (1991)) (to hold malpractice claim barred by court-approved settlement "would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that a court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence.")

In light of the existing split in the circuit courts' precedent over whether *Rooker-Feldman* closes the federal courthouse door to the citizens of our States, and the persuasive reasons for keeping that door open, this Court should grant certiorari to establish that persons who claim to have been victimized by class counsel and others through a collusive class settlement may bring an action in federal court against the parties alleged to have wronged them, notwithstanding *Rooker-Feldman*.

CONCLUSION

The ruling below ignores the jurisdictional defects of the Alabama judgment and improperly denies absent class members access to the federal courts. Such a result is both unjust and unsupported by the precedent of this Court. Therefore, the amici States urge the Court to grant certiorari for the purpose of reviewing and reversing the decision below.

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